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PARKWELL DEPARTMENTAL STORE SDN BHD v. ICSD VENTURES SDN BHD

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
ZABARIAH MOHD YUSOF JCA
B VAZEER ALAM MYDIN MEERA JCA
[CIVIL APPEAL NO: S-02(NCVC)(A)-1566-08-2017]
18 MARCH 2020

C ***CONTRACT:*** *Agreement – Tenancy agreement – Breach – Allegation of – Mutual termination of tenancy agreement between landlord and tenant – Claim by landlord for unpaid rental, costs of repairs and late payment interests – Whether there was unpaid rental due to landlord – Whether there was late delivery of vacant possession – Whether landlord entitled to charge late payment interests – Whether landlord entitled to cost for repair works – Whether landlord could forfeit tenancy deposits*
D *paid by tenant*

The appellant was the respondent's tenant in a shopping mall where the latter had let out different parts of the mall to the former. The parties' relationship was governed by the terms of a tenancy agreement. The appellant gave notice to terminate certain lots, which the respondent accepted. Pursuant to that, the
E appellant was to deliver vacant possession of the demised premises on 25 November 2014. Premised on the allegations that the appellant had breached the tenancy agreement, the respondent commenced a claim at the High Court for unpaid rental, cost for repairs and late payment interests. The appellant, on the other hand, counterclaimed for the refund of the tenancy
F deposits that the respondent had forfeited. The Judicial Commissioner ('JC') allowed the respondent's claim and dismissed the appellant's counterclaim. Hence, the present appeal. The issues that arose for adjudication were: (i) whether there was unpaid rental due to the respondent; (ii) regarding the delivery of vacant possession and double rental; (iii) whether the respondent
G was entitled to charge late payment interests at the rate of 1.5% per month; (iv) the cost for repair works for a burst pipe; and (v) whether the respondent was entitled to forfeit the tenancy deposits paid by the appellant.

Held (allowing appeal in part)
Per Vazeer Alam Mydin Meera JCA delivering the judgment of the court:

H **(1)** Item 9 of Schedule D of the tenancy agreement imposed a contractual obligation on the respondent to open 50% 'of its net rentable area on the third floor' and the 50% discount shall continue until 50% 'of occupation on the third floor is attained'. 'Attained' must necessarily be construed in relation to the respondent's obligation to open up at least
I 50% of the net rentable area by leasing the same to businesses. Although

'net rentable area' was not defined in the tenancy agreement, 'lettable area' was defined as 'All that portion of the mall set aside from time to time by the landlord for letting (whether actually let out or not) including the area occupied by the landlord'. Therefore, 'net rentable area' must mean the portion of the floor area of the mall that is set aside for letting by the respondent and that which is capable of being leased or rented to tenants. However, the tenancy agreement did not state: (i) the exact total net rentable area on the third floor; and (ii) it was for the management of the respondent to determine what was the measurement of the net rentable area on the third floor. In the absence of such stipulation, it could be gainsaid that it was open to the respondent to unilaterally determine the net rentable area. The calculation and determination of the net rentable area must be objectively done by the agreement of both parties and by reference to the third floor, otherwise the appellant would be left at the mercy of the respondent. Thus, it could not be intention of the parties that the respondent was to unilaterally decide what the net rentable area of the mall was. (paras 17 & 18)

(2) The interpretation of the terms of a commercial contract must be done such as to give business efficacy. If the intent of the parties in inserting item 9 of Schedule D was to ensure that there was sufficient visitor traffic volume on the third floor, who would ostensibly then move up to the fourth floor of the mall, then surely the attainment of 50% occupancy must necessarily relate to such tenants being in continuous business operations to pull the crowd to that upper floor; meaning that it must be 50% occupancy attained and maintained. According to the layout plan for the third floor, the net rentable of the third floor was 42,323sq ft. The net rentable area was further increased by the respondent by the letting of several retail kiosks on the third floor, giving an additional aggregate net rentable area of 798sq ft. The total net rentable area was 43,121sq ft (42,323 + 798) and, as such, the 50% occupancy as at 31 October 2013 could not have been met by the respondent by renting out 21,229sq ft; that would be below 50%. Therefore, the respondent was not entitled to claim for the additional rental from November 2013 to January 2015 in the sum of RM809,166. (paras 19, 23, 25 & 30)

(3) The parties had mutually agreed to terminate the tenancy agreement and the appellant was to deliver vacant possession of certain lots. There was a joint inspection of the premises by the representatives of the parties where the respondent requested that the appellant carry out restoration works as set out in the 'tenant vacating premises' form. These were the

A only restoration works that was required of the appellant and the latter fully-complied with the said request. The appellant then handed back possession of the said lots by delivering the keys on the agreed date. However, the respondent requested that the appellant carry out further restoration. This could not be the basis for the respondent to claim that
B vacant possession of the premises had not been delivered. As at the date of mutual termination of the tenancy, there was no further restoration that the appellant needed to do. Furthermore, the respondent had not shown that it suffered losses and damages in order for the appellant to indemnify it. (paras 31-34)

C **(4)** The JC allowed the claim for late payment interest at the rate of 1.5% per month and the basis of this award was cl. 6.08 of the tenancy agreement. However, cl. 6.08 dealt with forfeiture of deposits and had no application to the matter at hand; the correct clause that dealt with interest was cl. 12.02. Since the judgment for the 50% outstanding rental
D was set aside, the respondent was not entitled to any late payment interest on the alleged outstanding rental. The sum of RM175,754.75 awarded as late payment interest was set aside. (paras 36 & 37)

(5) The JC allowed the claim for RM1,000 being the cost for the repairs of a burst pipe caused by the appellant when renovation works were
E carried out in 2012. This part of the judgment was affirmed. There was no reason to disturb this finding as it was supported by evidence. (para 38)

(6) There was no basis in law for the respondent to forfeit the deposits. The forfeiture provision, under cl. 6.08 of the tenancy agreement, operated
F only when the respondent, as a landlord, terminates the agreement for breaches committed by the appellant. This was not the case here. The early determination of the tenancy was mutual and not by the respondent on the basis of breach of agreement by the appellant. Clause 6.08 would not have any application. Furthermore, as there were no
G breaches of the tenancy by the appellant as regards the claim for 50% rental, there was no basis for the deposits to be forfeited. Pursuant to cl. 6.03 of the tenancy agreement, the respondent shall refund the deposits to the appellant upon the determination of the tenancy. The High Court's dismissal of the counterclaim was reversed and allowed.
H (paras 40 & 41)

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Equitable Life Assurance Society v. Hyman [2002] 1 AC 408 ***(refd)***

Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd [2002] 5 CLJ 391 HC ***(refd)***
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Reardon Smith Line Ltd v. Hansen-Tangen; Hansen-Tangen v. Sanko Steamship Co [1976] 3 All ER 570 ***(refd)***
Rim Alliance Inc Sdn Bhd v. Haniffa Properties Sdn Bhd [2013] 1 LNS 1334 CA ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Sunshine Fleet Sdn Bhd v. Jabatan Kerja Raya Malaysia & Anor [2017] 9 CLJ 114 HC ***(refd)***

For the appellant - M/s Gabriel Ho & Co
For the respondent - M/s William Liaw Chan & Co

[Editor's note: Appeal from High Court, Sandakan; Suit No: SDK-22NCVC-4/3-2015 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera JCA:

Introduction

[1] The appellant was the respondent's tenant in a shopping mall known as Harbour Mall, Sandakan ("the mall"). The respondent had let out different parts of the mall to the appellant, namely:

(i) Lots Nos. 116 and 117 on Level 1 and Lots Nos. 219 and 210 on Level 2, which were used by the appellant for a departmental store; and

(ii) Lots Nos. 401 and 402 on Level 4, which were used for a supermarket.

[2] The parties' relationship was governed by the terms of a tenancy agreement dated 2 September 2013 ("the tenancy agreement").

[3] The appellant gave notice to terminate the tenancy of Lot Nos. 401 and 402 with effect from 22 November 2014, which the respondent accepted. Pursuant to that, the appellant was to deliver vacant possession of the demised premises on 25 November 2014.

[4] The respondent alleged that the appellant had breached the tenancy agreement and claimed for unpaid rental, cost of repairs and late payment interest. The appellant counterclaimed for refund of the tenancy deposits that the respondent had forfeited.

[5] The learned Judicial Commissioner gave judgment for the respondent on its entire claim and dismissed the appellant's counterclaim.

[6] The appellant appealed against the entire judgment of the High Court as embodied in the order dated 16 June 2017.

A **High Court's Order Dated 16 June 2017**

[7] The High Court delivered its judgment after a full trial and made the following order on 16 June 2017:

1. The Plaintiff's claim as per Statement of Claim is allowed, that is:-

B a) The said sum of RM1,055,169.15.

b) Rental for Lots 401 and 402 in the sum of RM34,624.20 per month from 31.1.2015 until such time the Defendant delivers vacant possession to the Plaintiff in the condition as it was before the premises were delivered by the Plaintiff to the

C Defendant together with agreed interest at the rate of 1.5% per month on the sum to be paid.

c) Agreed interest at the rate of 1.5% per month on the said sum of RM878,414.40 (unpaid 50% rental of RM809,166.00 and rent for Lot Nos: 401 & 402 of RM69,248.40) from 31.01.2015 to the date of full payment received by the Plaintiff.

D

d) Costs of RM70,000.00 subject to allocator.

2. Defendant's counterclaim is dismissed.

[8] The sum of RM1,055,169.15 stated in para. 1(a) of the order of 16 June 2017 is by reference to the statement of claim comprised of:

E

(i)	Unpaid 50% rent from		
	November 2013 to January 2015	–	RM809,166
(ii)	Rental for Lot Nos: 401 & 402 from		
	1 December 2014 to 30 January 2015	–	RM69,248.40
(iii)	Accrued interest on late payment	–	RM175,754.75
(iv)	Cost of repairing a burst pipe	–	RM1,000

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Issues On Appeal

G **[9]** There were several issues raised on appeal.

(i) The Issue Of The 50% Unpaid Rental

[10] The first issue is whether there was unpaid rental due to the respondent. This issue revolves around the interpretation of item 9 of

H Schedule D (special conditions) of the tenancy agreement. The parties had agreed, in item 9 of Schedule D (special conditions), that if the respondent was "not able to open fifty percent (50%) of its net rentable area on the third floor within six months after the tenant's grand opening of its supermarket/ departmental store, the landlord shall reduce the tenant's rental by fifty

I percent (50%) until fifty percent (50%) of occupation of the third floor is attained".

[11] Subsequently, the parties had agreed that the 50% rental deduction for the supermarket shall commence from 17 January 2013, whilst for the departmental store it shall commence from 3 February 2013, until 50% percent occupancy of the third floor is attained, as envisaged in item 9 of Schedule D (Special Conditions) of the tenancy agreement. For the record, it is immaterial that these dates are prior to the date of the tenancy agreement.

[12] By letter dated 30 December 2013, the respondent informed the appellant that they "have successfully achieved 50% occupancy at level 3 of the mall as at 31 October 2013." The respondent further informed the appellant in the same letter that the "50% rental deduction shall cease on 31 October 2013" and that "full rental charges shall commence on 1 November 2013."

[13] The appellant disputed that the 50% occupancy at the third floor had been attained and maintained, and contended that the respondent is not entitled to the full rental commencing 1 November 2013. This is essentially the primary dispute between the parties.

[14] Hence, the fundamental issue to be determined is whether the respondent had attained 50% occupancy of the net rentable area of the third floor of the mall as at 31 October 2013, and if they had, whether the 50% occupancy has to be maintained during the term of the tenancy. The answer to this question would determine whether the respondent would be entitled to charge full rental from the month of November 2013 onwards, as claimed.

[15] In answering these questions, the learned Judicial Commissioner found that the respondent had attained 50% occupancy of the third floor and held as follows:

> [13] What is clear in Item (9) of schedule is this. Parkwell was to be given a discount of 50% of the rental until 50% of occupation of the 3rd floor is attained. The occupancy of the 3rd floor is determined by calculating the net rentable area. Both parties had submitted on how this 50% was attained. ICSD had relied on the definition of "Lettable Area" that it's ICSD's management that determined so. But Parkwell said "50% occupancy" of the net rentable area is actual physical occupation and carrying on of business at all material times, it is the space actually used and occupied or 50% of the net rentable area being opened and/or maintained.
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> [14] I have read Item (9) of schedule D and the definition of "Lettable area" referred to by learned counsel for ICSD. I agree that it is the management of ICSD that determines the lettable area for the entire Mall (which included the 3rd floor) from time to time and how the 50% rate of occupancy was "attained". The evidence showed that there were agreements entered with the tenants as proof of the 50% having been

A attained. Parkwell had raised the issue of the unstamped agreements, that the tenants were not in operation but were renovating or that the tenants had no trading licence. The issues raised by Parkwell are not relevant. The tenants were in occupation as evidence of the agreements. There were documents and photographs as proof. I agree with submission of the learned counsel for ICSD that "As long as there are tenants, there is
B occupancy" and it is "50% occupancy attained and not maintained". On a balance of probabilities the 50% occupancy had been achieved in October 2013 which Parkwell had failed to rebut the same. I therefore answer the issue in the positive.

[16] We find, with respect, that, the learned Judicial Commissioner in
C coming to that conclusion had not fully appreciated the evidence. In particular, his finding that it is "the management of ICSD that determines the lettable area for the entire mall (which included the third floor) from time to time and how the 50% rate of occupancy was "attained" is not borne out by the terms of the tenancy agreement or the evidence.

D **[17]** Item 9 of Schedule D (Special Conditions) reads:

> In relation to the 3rd Floor of the Mall, the Landlord hereby agrees that in the event it is not able to **open fifty percent (50%) of its net rentable area on the 3rd Floor** within six (6) months after the Tenant's grand opening of its supermarket/department store, the Landlord shall reduce
E the Tenant's rental by fifty percent (50%) until fifty percent (50%) of occupation on the 3rd Floor is attained. (emphasis added)

The important point to be noted is that item 9 of Schedule D imposes a contractual obligation on the respondent to "open fifty percent (50%) of its net rentable area on the third floor" and the 50% discount shall continue until
F "fifty percent (50%) of occupation on the third floor is attained. Now, the word "attained" must necessarily be construed in relation to the respondent's obligation to open up at least 50% of the net rentable area by leasing the same to businesses.

[18] The next point is that "net rentable area" as used in item 9 of Schedule
G D is not defined in the tenancy agreement. However, the term "lettable area" is defined in the tenancy agreement to mean:

> All that portion of the mall set aside from time to time by the Landlord for letting (whether actually let out or not) including the area occupied by the Landlord.

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Now, taking that definition as a guide, "net rentable area" must mean the portion of the floor area of the mall that is set aside for letting by the respondent and that which is capable of being leased or rented to tenants. However, the tenancy agreement, did not specify the exact total net rentable
I area on the third floor. Neither does the tenancy agreement state that it is for the management of the respondent to determine what is the measurement of

the net rentable area on the third floor. In the absence of any such stipulation, it cannot be gainsaid that it was open to the respondent to unilaterally determine the net rentable area. The calculation and determination of the net rentable area must be objectively done by agreement of both parties and by reference to the third floor plan, otherwise the appellant would be left at the mercy of the respondent. Thus, it cannot be the intention of the parties that the respondent was to unilaterally decide what the net rentable area of the mall is.

[19] In fact, from the very beginning the appellant disputed the respondent's calculation of the net rentable area of 41,293sq ft for the third floor. The respondent based its calculation on the summary of tenants prepared by PW3 found at p. 586 of the record of appeal vol. 2(4) part B and C. However, the appellant takes issue with the calculation and contends that the minimum net rentable area of the third floor of the mall is 42,323 sq ft, as shown on the third floor layout plan, and not 41,293sq ft as claimed by the respondent. The appellant states that prior to commencement of the tenancy, the respondent had represented to the appellant that the net rentable area of the third floor of the mall is 42,323sq ft based on the third floor layout plan that was given to the appellant. That layout plan is found at p. 1584 of the record of appeal vol. 2(10) part B and C. We agree with submissions of counsel for the appellant that according to this layout plan the net rentable area of the third floor is 42,323sq ft. Further, there is also evidence showing that the net rentable area was subsequently increased by the respondent by the letting of several retail kiosks on the third floor giving an additional aggregate net rentable area of 798sq ft. Thus, the appellant submits that the total net rentable area on the third floor was 43,121sq ft (42,323 + 798). We find merit in this submission as the same is supported by the evidence of DW1. And thus, if the net rentable area is taken as 43,121sq ft, then the 50% occupancy as at 31 October 2013 could not have been met by the respondent by renting out 21,229sq ft of that space. That would be below fifty percent (50%). We find that the learned Judicial Commissioner had not given proper consideration to these evidence.

[20] Further, in calculating the occupancy rate at the third floor as at 31 October 2013, the respondent had taken into account the following tenancies by:

(i) Norman Enterprise (Kids World Playground) for Lots 319 and 320, which units, even as late as November 2013, were still being renovated and were not open for business as at 31 October 2013;

(ii) One Real Estate Sdn Bhd (Korean Gallery) for Lots 314 and 315, the tenancy of which commenced only on 1 November 2013; and

(iii) One Real Estate Sdn Bhd (One Real Gallery) for Lots 316, 317 and 318, the tenancy of which commenced only on 1 November 2013.

[21] Additionally, One Real Estate Sdn Bhd terminated their tenancy for Lots 314 and 315 on 31 March 2014 (Korean Gallery), and for Lots 316, 317 and 318 (One Real Gallery) on 11 April 2014. Thereafter, One Real Estate stopped operating their business from these premises. Hence, One Real Estate Sdn Bhd was a tenant for some four months only, and Lots 314 to 318 were no longer open for business.

[22] Now, the qualifying words in item 9 of Schedule D for the respondent's entitlement to full rental are – "In relation to the third floor of the mall, the landlord hereby agrees that in the event it is not **able to open fifty percent (50%) of its net rentable area on the third floor** ..." (emphasis added).

[23] The words "able to open fifty percent of its net rentable area on the third floor" must necessarily mean that the lettable space on the third floor must be open for business operation, and must be continuously open for business, for the purposes of calculating whether the 50% occupancy had been attained. The reason for this is well stated in the appellant's letter dated 11 July 2014 wherein the appellant reiterated that:

> ... in respect of the "50% occupation rate" issue, prior to the signing of the tenancy agreement, both parties understood, and as reflected by our tenancy agreement and earlier correspondences, the 50% occupation must relate to opening of net rentable area to ensure there is sufficient crowd to travel or move up to our 4th floor premises.

This was never refuted by the respondent. Thus, if the intent of the parties in inserting item 9 of Schedule D was to ensure that there was sufficient visitor traffic volume on the third floor, who would ostensibly then move up to the fourth floor of the mall, then surely the attainment of 50% occupancy must necessarily relate to such tenants being in continuous business operations to pull the crowd to that upper floor; meaning that it must be 50% occupancy attained and maintained.

[24] On the converse, if the interpretation of the respondent is applied, as was accepted and applied by the learned Judicial Commissioner, the respondent can merely achieve the 50% occupancy on a particular date and almost immediately thereafter have the entire third floor empty of tenants. This surely cannot be the intention of the parties in inserting item 9 to Schedule D as a special condition.

[25] The interpretation of the terms of a commercial contract must be done such as to give business efficacy. The doctrine of purposive construction of

contracts entails that in the construction of a contractual term there must be ascribed to the words a meaning that would make good commercial or business sense. In this regard, the duty of the court is to construe the words used in the contract to give business efficacy to the bargain between the parties, rather than to strike down the words as bearing no meaning or an obtuse literal meaning. Every word used in the contract must be presumed to be used by the parties intentionally and for a purpose, and the words must be given their plain and ordinary meaning. If the terms or words used can be given a meaning that would accord with the purpose for which the term is contained in the contract, then a purposive construction must be made to give effect to it.

[26] Having said that, in objectively construing the terms of a contract, inferences can be drawn not only from the language the parties have used, but also from the parties' conduct, with regard being had to the applicable surrounding circumstances, and the object of the contract. This was explained by Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdb Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754, in the following words:

> As clear and helpful an enunciation of the principles as any which should guide the Court in determining the ever recurring question of whether there has been a contract between the parties is provided by Saville J in *Vitol B.V. v. Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep. 574, at 576 in the following words:
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> > The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

That approach to construction of contracts, ie, objectively ascertaining the intention of parties has been consistently applied by our courts (see *Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd* [2002] 5 CLJ 391, HC; *Rim Alliance Inc Sdn Bhd v. Haniffa Properties Sdn Bhd* [2013] 1 LNS 1334, CA; and *Sunshine Fleet Sdn Bhd v. Jabatan Kerja Raya Malaysia & Anor* [2017] 9 CLJ 114, HC).

[27] Further, in *Reardon Smith Line Ltd v. Hansen-Tangen; Hansen-Tangen v. Sanko Steamship Co* [1976] 3 All ER 570 the House of Lords stated that in construing a commercial contract regards should be had to the commercial purpose of the contract and the factual background against which it had been made and specific words or terms used in the contract could be given a more liberal construction than they could as words of contractual description. The court further held that contractual words must be construed so as to signify the objects of the contract and relate to the intention of the parties (see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151, FC).

[28] The purpose of interpretation, as Lord Steyn observed in *Equitable Life Assurance Society v. Hyman* [2002] 1 AC 408, "is to assign to the language of the text the most appropriate meaning which the words can legitimately bear." That principle was reiterated by the Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464, where Zainun Ali FCJ held as follows:

> [34] Where the natural meaning of the contract is not clear and in the particular absence of words to the effect mentioned above, the principles in ICS in their qualified form (see [28] which qualifies its application *vis-à-vis* rectification), remain applicable and relevant to the construction of the construct such as to enable the court to objectively determine "the meaning which the contract would convey to a reasonable person having all the background knowledge ... available to the parties."
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> [35] The principles of Lord Hoffman were summarised in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 at p. 296 CLJ; [42] 620G (MLJ). Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:
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> > Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.

[29] Thus, in applying these principles, we find that the interpretation of item 9 of Schedule D as advanced by the appellant is the one that gives business efficacy to the contract, and in this regard we find that item 9 of Schedule D must be interpreted to imply that the respondent's attainment of the 50% occupancy of the third floor must be taken to mean that these rentable spaces ought to be continuously occupied and open for business as it had business and commercial implications on the appellant's occupancy. Hence, we agree with the appellant that the 50% occupancy must be attained and maintained. Thus, with respect, we find that the finding of the learned Judicial Commissioner in this regard is plainly wrong.

[30] This means that the respondent is not entitled to claim for the additional 50% rental from November 2013 to January 2015 in the sum of RM809,166. Therefore, we set-aside the judgment for the sum of RM809,166 that the High Court had awarded.

(ii) Issue Of Delivery Of Vacant Possession And Double Rental

[31] Parties had mutually agreed to terminate the tenancy agreement and the appellant was to deliver vacant possession of Lots 401 and 402 on or before 25 November 2014. The respondent contends that the appellant failed to deliver vacant possession of both Lots 401 and 402 in the same condition as when the appellant took possession of the said lots at the beginning of the tenancy and settle all outstanding payments to the respondent, as is required under cls. 9.15 and 9.18 of the tenancy agreement. The respondent further contends that Lots 401 and 402 were restored to their earlier condition only in March 2015, and hence claims double rental of RM69,248.40 per month for the period from 1 December 2014 till end of March 2015. The learned Judicial Commissioner allowed this claim.

[32] We find that in making that award, the learned Judicial Commissioner had failed to consider the evidence in its entirety. In particular, there is uncontroverted evidence to the effect that there was a joint inspection of the premises by representatives of the parties on 22 November 2014, whereupon the respondent had requested the appellant to carry out restoration work as set out in the "tenant vacating premises" form dated 22 November 2014. These were the only restoration work that was required of the appellant to restore the premises to its original condition. The appellant fully complied with that request and completed the restoration works as stated in the "tenant vacating premises" form. The appellant had thereafter handed back possession of Lots 401 and 402 to the respondent by delivering the keys to the premises on or before 25 November 2014, which was the agreed date for re-delivery of vacant possession of the premises.

[33] The respondent had, subsequent to the hand over, by letter dated 9 December 2014 unilaterally requested the appellant to carry out further restoration works at the demised premises, works that were never identified during the joint inspection on 22 November 2014. The appellant argues that this cannot be the basis for the respondent to claim that vacant possession of the premises had not been delivered.

[34] We agree that the stand taken by the respondent is unreasonable. If at all the premises had not been restored to its original condition when handing over, then pursuant to cl. 9.15 of the tenancy agreement the respondent "shall be at liberty to carry out such restoration and the costs and expenses thereof shall be borne by the tenant and payable to the landlord upon demand." The respondent did not avail itself of this right. Further, cl. 9.15 states that the appellant shall indemnify the respondent for any loss suffered only by reason of the restoration work not being completed before the expiration or sooner determination of the tenancy. The respondent cannot rely on this provision as the appellant had carried out all restoration works identified by parties at the joint inspection on 22 November 2014 well before the appointed date for delivery of vacant possession on 25 November 2014. As at the date of mutual termination of the tenancy, there was no further restoration that the appellant needed to do. Further, the respondent had not shown that it had suffered loss and damage in order for the appellant to indemnify it.

[35] The other clause referred to by the learned Judicial Commissioner in making this award of double rental is cl. 9.18. Now, cl. 9.18 is the holding over clause, ie, if the appellant as tenant without the consent of the respondent as landlord holds over and continues to occupy the demised premises beyond the expiration of the term, then the appellant would be liable to pay double rental. It is clear from the evidence that there is no holding over by the appellant. The appellant had vacated the premises and handed over the keys on or before 25 November 2014, as agreed. The appellant cannot then, by any stretch of imagination, be said to be in occupation of the demised premises and holding over after that date. The mere fact that the respondent had belatedly, ie, after the appellant had vacated the premises, unilaterally identified further restoration works to be done on the premises, mean that until these works are done the appellant is deemed to still be in occupation and holding over. That does not make sense at all. To hold as such would be highly unjust and prejudicial to the appellant. Hence, we find that there is no basis in law and in fact for the award of double rental and the learned Judicial Commissioner had not properly appreciated the facts and law in making the award. Thus, we set aside the judgment for the double rental for holding over.

(iii) The Issue Of Whether The Respondent Is Entitled To Charge Late Payment Interest At The Rate Of 1.5% Per Month

[36] The late payment interest charge at the rate of 1.5% per month was imposed by the respondent on the alleged outstanding monthly rental of 50% after the respondent is said to have achieved 50% occupancy of the third floor as well as late payment of utility charges. The learned Judicial Commissioner allowed this claim and awarded the sum of RM175,754.75 as interest on late payment. The basis of the award is cl. 6.08 of the tenancy agreement, as stated in the grounds of judgment.

[37] With respect, cl. 6.08 deals with forfeiture of deposit and has no application to the matters at hand. The correct clause that deals with interest is cl. 12.02 of the tenancy agreement. In any event, since we have set aside the judgment for the 50% outstanding rental for reasons discussed earlier, concomitantly, we find that the respondent is not entitled to any late payment interest on the alleged outstanding rental. Thus, we set aside the sum of RM175,754.75 awarded as late payment interest.

(iv) The Issue As Regards The Cost For Repairs Of A Burst Pipe

[38] Parties have raised the issue of the claim by the respondent for the cost of repairs of a burst pipe caused by the appellant when renovation works were being carried out on 20 October 2012. The learned Judicial Commissioner had allowed this claim for RM1,000 being the cost of the repair. We do not find any reason to disturb that finding as it is supported by evidence, and as such we affirmed that part of the judgment.

(v) Counterclaim – The Issue Of Forfeiture Of The Tenancy Deposit Paid By The Appellant

[39] In the counterclaim, the appellant sought a declaration that the respondent had wrongfully withheld or forfeited the rental/security deposit amounting to RM339,362.70, utilities deposit of RM50,000 and letter box deposit of RM100 paid under the tenancy agreement. The learned Judicial Commissioner dismissed the counterclaim on grounds that there were manifest breaches of the agreement by the appellant and thus the forfeiture of the deposit was permissible under cl. 6.08 of the tenancy agreement.

[40] We find that there is no basis in law for the respondent to forfeit the deposits. Firstly, the forfeiture provision in cl. 6.08 operates only when the respondent, as landlord, terminates the agreement for breaches committed by the appellant. The operative words of cl. 6.08 reads:

> **In the event of this Agreement being terminated by the Landlord** in accordance with Section 12.01 of this Agreement, the Deposit may at the absolute discretion of the Landlord be forfeited to the Landlord by way of liquidated damages ... (emphasis added)

That is not the case here, the early determination of the tenancy was mutual and not by the respondent on the basis of breach of the agreement by the appellant. Hence, cl. 6.08 would not have any application.

[41] Further, as we have found that there were no breaches of the tenancy by the appellant as regards the claim for the 50% rental, there is no basis in fact or in law for the deposits to be forfeited. Thus, pursuant to clause 6.03 of the tenancy agreement, the respondent shall refund the deposit to the appellant upon determination of the tenancy. Hence, we reversed the High Court's dismissal of the counterclaim and allowed the appellant's counterclaim.

[42] Therefore, we make the following orders:

(i) that the appeal is allowed in part, in that, except for the judgment for the sum of RM1,000 being the cost of repairs of the burst pipe, the remainder of the order dated 16 June 2017 is set aside;

(ii) judgment is entered for the appellant on the counterclaim in the following terms:

(a) a declaration that the appellant was not in breach of the tenancy agreement over the non-payment of full rental as the fifty percent (50%) occupancy of the net rentable area on the third floor of the mall had not been achieved in accordance with item 9 of Schedule D (Special Conditions) of the tenancy agreement;

(b) a declaration that the respondent has wrongfully withheld and/or forfeited the tenancy deposits paid by the appellant under the tenancy agreement; and

(c) that the respondent shall forthwith refund the tenancy deposits totaling RM389,462.70 to the appellant.

(iii) that costs here and below in the sum of RM50,000 is awarded to the appellant to be borne and paid by the respondent.